

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CRI-2011-404-185
[2012] NZHC 1940**

THE QUEEN

v

JOSHUA MASTERS

Hearing: 3 August 2012

Counsel: B Northwood for Crown
RM Mansfield and V Withy for Prisoner

Judgment: 3 August 2012

SENTENCING NOTES OF TOOGOOD J

Solicitors:

RM Mansfield/V Withy, Barrister, Auckland: ron@22lorne.c.nz

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[1] Joshua James Masters, you appear for sentence having pleaded guilty to one count of supplying the Class A controlled drug methamphetamine on 23 April 2008; one count of conspiring to supply methamphetamine on 1 May 2008; one count, which is a representative charge, of supplying the Class A controlled drug methamphetamine between 12 February 2008 and 5 May 2008; and one count of money laundering.

The circumstances of your offending

[2] You were arrested in May 2008 at the end of an extensive Police investigation into the activities of the Tribesmen and Killer Beez gangs, which included some 84 days of intercepting telephone calls and text messages. A large number of persons were arrested - I think Mr Northwood said something in the order of 44 or so - principally on charges of dealing in methamphetamine; other drugs were also involved.

[3] You pleaded guilty to the four charges on 6 September 2010 and, almost two years after that, I delivered a judgment following a pre-sentence disputed facts hearing conducted under s 24 of the Sentencing Act.¹ For the reasons given in that judgment, I concluded that you had a substantial leadership role in the Killer Beez gang and that, along with other members of the gang, you were heavily involved in major drug dealing.

[4] Despite your guilty pleas, entered at the beginning of your scheduled trial, your evidence at the disputed facts hearing was intended to minimise your involvement in drug offending and went so far as to suggest that you were not in fact guilty of the charges of supplying Mr Liu and not guilty of money laundering. You claimed that you were opposed to dealing in drugs and suggested that what I accept are your considerable leadership qualities were directed to demonstrating to those with whom you associated that there were legitimate ways to make progress in life.

¹ *R v Masters* [2012] NZHC 1831.

[5] On your evidence, you focused most of your time and attention on the Colour Way Records business which, I accept, involved the promotion of South Auckland-based recording artists, including yourself; the holding of concerts; and the production of CDs and related merchandise. You said, however, that those around you did what they needed to do to get on in life and that, while you were aware that some of them were dealing in drugs, you did no more than put people in touch with each other.

[6] You claimed that that was the basis on which you pleaded guilty after being advised that what you were doing was against the law.

[7] I trust I made it clear in my judgment on the disputed facts - and if not, Mr Masters, I make it clear now - that I regarded your evidence to be a complete fabrication. I was distinctly unimpressed by your attempts to lie your way out of evidence which, in my view, provided compelling proof that, at least for the period between 12 February and 5 May 2008, you were deeply involved in receiving and supplying large commercial quantities of methamphetamine, including to Mr Liu.

[8] I have no doubt that your guilty plea to money laundering was entirely appropriate and that you used the proceeds of your drug dealing to support your music business.

[9] In the judgment I delivered, I held that your offending involved a total quantity of at least 308 grams of methamphetamine, including 224 grams actually supplied to you by Mr Nguyen and 84 grams seized by the Police when Mr Nguyen was intercepted on his way to make a delivery to you on 1 May 2008.² Having heard evidence over three days, including intercepted communications between your associates and you in the period from February to May 2008, I accept the submission for the Crown that your actual drug dealing involved more methamphetamine than the 308 grams with which Mr Nguyen was proved to be involved. As I said in the disputed facts judgment, there is some uncertainty as to the specific amounts, but I

² At [73].

am satisfied that your offending involved in the region of 375 - 400 grams of methamphetamine in total;³ that can only be an estimate.

Approach to sentencing

[10] I now explain to you the process which I have followed in determining the sentences to be imposed upon you.⁴ First, I have established a starting point which reflects the nature of your offending itself. In doing so I have looked at guidelines provided by the Court of Appeal; I have considered the features of your offending, both aggravating and mitigating; and I have compared the sentences imposed in other broadly similar cases.

[11] In addition to taking account of the need for consistency with other cases generally, I have endeavoured to ensure an appropriate relativity of treatment between other offenders apprehended in this operation and you, particularly Mr Nguyen.

[12] I also take into account the maximum sentences to which you are liable. On the charges of supplying methamphetamine you are liable to life imprisonment.⁵ On the charge of conspiracy to supply methamphetamine the maximum sentence is 14 years' imprisonment.⁶ On the count of money laundering you are liable to be imprisoned for a maximum of seven years.⁷

[13] Bearing in mind the totality of your offending, I have looked at whether I should adjust the starting point sentence to take account of any aggravating or mitigating personal circumstances. I make the point now that in sentencing for serious drug dealing offences, which these were, personal factors carry little weight. However, you are entitled to credit and some discount from your sentence to recognise the guilty pleas you entered at the start of the trial. The extent of any discount depends on the circumstances of the pleas and the degree to which they

³ At [18] where I concluded that the offending was clearly in the middle of *Fatu* band 3 (see [16] to [18] below).

⁴ *R v Clifford* [2011] NZCA 360, [2012] 1 NZLR 23 at [60].

⁵ Misuse of Drugs Act 1975, s 6(2)(a).

⁶ Misuse of Drugs Act 1975, s 6(2A)(a).

⁷ Crimes Act 1961, s 243(2).

indicate a genuine acceptance of responsibility and remorse for your offending. I will have more to say about that in a moment.

[14] Finally, I have considered whether I should impose a minimum period of imprisonment to reflect the sentencing purposes of accountability; denunciation; deterrence; and the protection of the community.⁸

[15] In looking at all of these matters, I have had regard to the comprehensive written and oral submissions made by Mr Mansfield on your behalf, and I have been assisted by them, and to the letter that you wrote and the other supporting material you have presented through counsel.

Starting point - guidelines

[16] The Court of Appeal has provided guidelines for sentencing for offences involving the sale and supply of methamphetamine.⁹ In determining the appropriate band and starting point the Court considers the total quantities involved in the offending overall and does not look only at individual transactions.

[17] The guidelines apply to conspiracy charges, although some reduction in the starting point relative to each band is appropriate in order to reflect the lesser maximum penalty of 14 years' imprisonment.¹⁰

[18] In the guideline judgment, sentencing Band 3 applies to the supply of large commercial quantities – that is 250 grams to 500 grams – for which the starting point is between eight years' and 11 years' imprisonment. As I have said, your offending clearly falls in the middle of that band.

Sentences imposed on co-offenders

[19] I have considered the sentences imposed on three of the four persons with whom you were scheduled to stand trial.¹¹ Richard Charles Hemopo, who was

⁸ Sentencing Act 2002, s 86(2).

⁹ *R v Fatu* [2006] 2 NZLR 72 at [34].

¹⁰ *R v Te Rure* [2007] NZCA 305, [2008] 3 NZLR 627; *Jarden v R* [2008] NZSC 69, [2008] 3 NZLR 612.

convicted of three counts of supplying methamphetamine over an eight-day period, was regarded by the sentencing Judge as falling in the lower half of Band 2 in the *Fatu* decision to which I have referred, the quantity involved in his dealing being between 15 and 20 grams. He was sentenced to a period of three years and four months' imprisonment, the sentence would have been longer except for the fact that he was confined on electronically monitored bail for a period of 18 months prior to trial.

[20] Anthony Mate Farac was involved over a period of some two months in dealing around 15 grams of methamphetamine and was also placed at the lower end of *Fatu* Band 2. Mr Farac was said to have a drug addiction and for other personal reasons received what the Judge described as a lenient sentence of two years eight months' imprisonment.

[21] Raymond Pona was convicted of only one count of supplying methamphetamine involving somewhere between five and 10 grams. He in fact pleaded guilty late in the piece, and I understand it, and ended up with a sentence of nine months' home detention.

[22] Your co-offender Minh Hong Nguyen was convicted of the five counts of supplying methamphetamine to you on dates between 22 April and 30 April 2008; and two counts of conspiring to supply methamphetamine, including the conspiracy with you on 1 May 2008. His offending is closer in scale to yours than that of the other three. The total quantity of drugs involved in Mr Nguyen's offending was 336 grams, which the sentencing Judge said placed Mr Nguyen's offending in the middle of *Fatu* Band 3. The Judge took a starting point of nine years' imprisonment and then uplifted it by a further three months to take into account Mr Nguyen's persistent offending and the fact that he had previous methamphetamine-related convictions.

¹¹ *R v Nguyen & Ors* HC Auckland CRI-2008-092-017198, 24 November 2010.

Starting point – nine years six months' imprisonment

[23] The Crown has submitted that although the quantity of methamphetamine which was precisely identified in your case was slightly lower than that for which Mr Nguyen was convicted, a starting point of nine-and-a-half years' imprisonment is in order in your case, bearing in mind the greater scope of your offending overall and the length of the period during which your offending took place.

[24] Mr Mansfield, on your behalf, submits that parity with Mr Nguyen is important. He argues on that basis that a starting point of eight years three months' imprisonment should be adopted.

[25] The starting point which Mr Mansfield advocates would place your offending at the bottom of Band 3. However, as I have said, the amounts of methamphetamine I found to be involved clearly place you in the middle of that band – that is, the 308 grams involved in your offending with Mr Nguyen and other methamphetamine involved in the dealing at an earlier stage between February and April 2008.

[26] Further, I consider the scale of your offending and the role you played to be that of a distributor of large commercial quantities of methamphetamine, the abuse of which has been recognised by the Courts as the most serious drug problem facing our country. There is no evidence that you are a user of this drug; I am satisfied that your offending was motivated by greed and the prospect of easy money, facilitated by the network which was available to you and which you controlled. Bearing in mind a total estimated quantity of around 400 grams, I take nine years six months' imprisonment as an initial starting point.

[27] The Crown submits that an uplift of a further two-and-a-half years' imprisonment is necessary to take into account the leadership role you had in the drug-dealing activities of the Killer Beez organisation. Although you professed on oath to have had no actual involvement in drug dealing, I have no doubt that you used your mana to run the operation and that you had a hands-on role to the extent I have discussed in the disputed facts judgment. Bearing in mind the initial starting point, I add a further 18 months to the starting point to take account of the pivotal

leadership role you played in the distribution of an evil drug which causes great misery in our society.¹² That provides a starting point of 11 years' imprisonment as an appropriate reflection of the totality of your offending.

Personal factors

[28] I turn now to personal factors. I accept Mr Mansfield's submission that you are a complex character and somewhat enigmatic. I have read the pre-sentence report and you told me something of your life during the disputed facts hearing. Mr Mansfield has expanded on those matters in his submissions. You are 35 years old and have lived in Otara most of your life. You appear to have had a very unsettled upbringing and education. You said that, as a child, you were passed around by family members and lived all over Otara; you had attended every primary school, both intermediates and both colleges in the district. You attended school in Northland for a period. You left school when you were 17 after your second year in the fifth form and, although you passed some academic subjects, it was sport at which you excelled.

[29] You achieved recognition as a representative rugby league player and you worked in the construction industry for a period. But, no doubt in part, at least, because of your family background, you became a patched member of the Tribesmen Motorcycle gang at the age of 21 in 1998, and you became President in due course. Your contribution to that organisation included committing a serious assault on a member of a rival gang, for which you served a term of imprisonment. During the early 2000s, you founded the Killer Beez gang which you deny was formed for the purpose of criminal activity; you said it was more like an association of people needing companionship and assistance to get on in life. You incorporated that organisation under the Companies Act and you also founded and ran Colour Way Records as an incorporated business.

[30] Mr Mansfield refers to your unsettled past as a mitigating factor in your case. Reference is also made to your potential to reform and I have received and considered the letter to the Court in which you express your hopes for the future.

¹² *Fatu* at [31].

You say you are remorseful for the crimes you have committed. But in light of the evidence you gave at the disputed facts hearing only two months ago, denying some of your offending and minimising your involvement, I am unable to attach much weight to that claim. Your purported acceptance of responsibility for your offending has a hollow ring and it comes far too late to be given any separate consideration as a mitigating factor.

[31] I accept that you have genuine leadership qualities and undoubted business acumen. That much is evidenced by your successful completion of a course in Small Business Management through the Open Polytechnic while on remand. It is a great shame that your obvious qualities as a charismatic leader amongst your peers were not confined to legitimate business enterprises. But the testimonials from your fellow prisoners impress on me that you have the potential to do well in the future and to encourage positive behaviour not only in yourself but among others. You have attended appropriate courses and the pre-sentence report indicates that you have made some progress towards rehabilitation.

[32] Aggravating personal factors include your previous history of some 37 criminal convictions. Although a number are relatively minor and none are for drug dealing, the list includes convictions for injuring with intent to injure; obstructing the course of justice; two counts of aggravated robbery; and wounding with intent to cause grievous bodily harm. I do note that your last serious conviction, that of injuring with intent to injure, occurred nearly nine years ago.

[33] Your criminal history does you no credit and, while it would be wrong to sentence you again for past offending, the length and nature of your criminal history would usually require that it be taken into account as demonstrating a greater need to impose a sentence which deters you from future offending. I do not mind telling you, Mr Masters, that when I first came into Court this morning I had considered uplifting your sentence by a further six months to take account of your history. But I have taken into account the positive indications in the pre-sentence report and the other material which you have provided, including the letters from people with whom you have been associated in business and your fellow prisoners. I do not now intend to impose that further uplift. So that means, in effect, that I have given you

six months' credit for the positive personal factors which Mr Mansfield has referred to.

[34] That means that, before taking into account your guilty pleas, a period of 11 years' imprisonment would be an appropriate sentence.

Discount for guilty pleas

[35] I turn to consider the extent to which you should be given a discount from the sentence to reflect your guilty pleas. Because what has occurred since September 2010 has influenced my assessment of the appropriate discount, it is necessary to explain the delay in some detail.

[36] You did not plead guilty at the earliest stage at which a plea could be taken and it was only on the morning you were to go on trial before a jury that your guilty pleas were entered. That was over two years after your arrest and after numerous court appearances, which included an attempt to have the charges dismissed. Although it may suit your purposes now to suggest that you had stepped aside from a leadership role in the Killer Beez gang, it is noteworthy that you asked to be discharged on all of the counts you faced on the grounds that the nature and extent of pre-trial publicity relating to you and the Killer Beez gang, of which you said you were the acknowledged leader, would breach your right to a fair trial.

[37] On the matter of adverse publicity, which you have raised in your letter, I assure you that I have based my views solely on the matters properly before the Court and on my view of you and your offending after hearing three days of evidence.

[38] Often a guilty plea entered as late as the beginning of a trial is regarded as a starting point on the road to rehabilitation, in that it is seen as an acknowledgement of responsibility for the offending. But since you pleaded guilty in September 2010, you have manipulated the judicial process and avoided being finally brought to account for almost two further years. I accept, of course, that you have been in custody throughout the remand period but not as a sentenced prisoner.

[39] At the disputed facts hearing and again today, it has been suggested that there were legitimate reasons for the numerous adjournments which were necessary in the sentencing process.

[40] As I read through the Court file I see a number of instances of your changing counsel. You appeared before Priestley J in March 2011 for a disputed facts hearing but you claimed to need more time to consider the Crown's evidence which, you said, had only recently been provided to you. You sought to blame your lawyers for their failure to deliver relevant documents to you. Then, when that was proved to be untrue, you indicated that you wanted to vacate your guilty pleas, arguing that the Crown had overstated the amount of methamphetamine involved in the offending to which you had previously pleaded guilty. Sentencing was due to take place in April 2011 but you contrived a disagreement with counsel who was necessarily given leave to withdraw. Priestley J, who was familiar with the evidence against you having presided over the trial of Mr Nguyen and others, said then that you were toying with the system and playing games.

[41] As a result of the indication that you wished to change your pleas, you were remanded to appear again in June 2011, then July 2011, and a hearing date for what was said to be a pending application to vacate your plea was allocated for August 2011. Difficulties over representation continued and you were remanded to appear for sentence on 3 November 2011. Only then did you make an application to vacate your plea. Although Mr Mansfield was acting for you by that stage, there were difficulties in obtaining a grant of legal aid. Your application to vacate your pleas was set down for hearing in February this year but was again adjourned, although, I accept, at the request of counsel not you. In March, you finally abandoned the challenge to your pleas, on the basis of sound advice from Mr Mansfield that it had no prospect of success.

[42] At that stage attention became focused on a disputed facts hearing. As I observed in the course of my judgment following the hearing of evidence given in the main by you, it was clear that you did not accept that you were properly convicted of supplying Mr Liu with methamphetamine or of money laundering. You claimed that your only involvement in the supply of methamphetamine between

February and May 2008 was facilitating meetings between Mr Nguyen and others dealing in drugs. You said that your partner Ms Eyles had control and management of the finances of Colour Way Records and that you did not knowingly use drug money in that business. Those propositions are inconsistent with your pleas.

[43] Usually a prisoner who pleads guilty at the start of a trial would be given some credit for the plea on the basis of at least an acknowledgement of guilt and credit for avoiding the expense of a trial.¹³ Bearing in mind the strong case which the Crown had against you and the lateness of the pleas, it would have been reasonable to allow a ten percent discount on account of your plea if you had been sentenced with Mr Nguyen and the others in November 2010.¹⁴ However, you have denied the extent of your offending. Furthermore, getting you from the point at which you pleaded guilty to today's sentencing has occupied a great deal of court time and judicial resource. You have managed overall to delay being dealt with for well over four years since you were arrested for serious offending in respect of which there was compelling evidence.

[44] Another Judge may have decided that these circumstances would disqualify you from receiving any discount, but I consider you should be given a reduction of around five percent in the sentence which would otherwise be appropriate; that is, seven months' imprisonment. The effective end sentence then will be one of ten years five months' imprisonment.

Minimum period of imprisonment

[45] In ordinary circumstances, you would be eligible for parole after serving one-third of the effective end sentence which I impose.¹⁵ However, the Court may impose a longer minimum period of imprisonment if it is satisfied that the period that would otherwise apply is insufficient for all or any of the purposes of holding the offender accountable; for the harm done by the offending; denouncing the offender's conduct; deterring the offender or other persons from committing the

¹³ *Hessell v R* [2012] NZSC 135, [2011] 1 NZLR 607 at [45].

¹⁴ See for example: *R v Bouavong* [2012] NZHC 932.

¹⁵ Parole Act 2002, s 84(1).

same or a similar offence; and protecting the community from the offender.¹⁶ It is almost invariable in cases of serious drug offending that a minimum period of imprisonment is considered necessary for at least one of those purposes,¹⁷ and the Crown has submitted that a minimum period of fifty percent of the end sentence should be imposed in your case. Mr Mansfield says that a minimum period is not necessary in your case because of the factors of your guilty plea, your lack of previous drug convictions, and your efforts at rehabilitation.

[46] However, having regard to the extent of your offending and in particular your refusal to accept real responsibility for it, I am satisfied that the factors I have referred to would not be adequately addressed if you were eligible for parole after just over four years of the term. You need to be held accountable, in particular, for the misery your offending will have inflicted on others, and the community needs to be protected from you while you face up to it. I note that the pre-sentence report records a view that you still represent a high risk of reoffending. The sentence needs to be one which will deter you from reoffending in the future. I consider an appropriate minimum term in your case to be one of five years nine months' imprisonment.

[47] By agreement of counsel, the Crown's application for forfeiture orders is adjourned for further consideration.

[48] Mr Masters please stand.

Sentences

[49] On **counts 7 and 22** of supplying methamphetamine you are sentenced to **ten years and five months' imprisonment**. On **count 10** of conspiring to supply methamphetamine you are sentenced to **eight years' imprisonment**. On **count 25** of money laundering you are sentenced to **four years' imprisonment**.

[50] All terms are to be served concurrently with the others, meaning that the total effective end sentence is one of ten years five months' imprisonment. You will serve

¹⁶ Sentencing Act 2002, s 86.

¹⁷ *R v Aram* [2007] NZCA 328.

a minimum period of five years nine months' imprisonment before you become eligible for parole.

[51] On the remaining counts in the indictment, the Crown offers no evidence and you are discharged under s 347 of the Crimes Act 1961.

[52] Stand down.

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Toogood J